STATE OF MICHIGAN

MACOMB COUNTY CIRCUIT COURT

FORSYTH/BIA, INC.,

Plaintiff,

vs. Case No. 2014-4412-CK

BIA ASSOCIATES, INC.,

Defendant.
_____/

OPINION AND ORDER

Plaintiff has filed a motion for summary disposition. Defendant has filed a response and requests that the motion be denied. In addition, Plaintiff has filed a reply in support of its position.

Facts and Procedural History

In December 2007, Defendant bought three businesses owned by Frank and Suzanne Forsyth. Several documents were prepared and executed in connection with the sale. The primary document was a December 13, 2007 Asset Purchase Agreement ("Agreement"). After the purchase price was determined, the parties executed a note ("Note") pursuant to which Defendant promised to pay Plaintiff $1,148,995.00, with a 6% interest rate over the course of 60 months, at a rate of $22,213.29 per month.

While Defendant made many payments pursuant to the Note, Defendant began experiencing financial difficulties. As a result of its difficulties, Defendant requested a reduction to the monthly payment amount pursuant to the Agreement. After recalculating the monthly payments pursuant to the Agreement the parties agreed that the reduction to the monthly

payment amount would be made up in the form of an increased balloon payment at the end of the 60 month term. Despite the reduced monthly obligation, Defendant has failed to make the required payments under the Note.

On November 12, 2014, Plaintiff filed its complaint in this matter alleging that Defendant has breached the terms of the Note. On December 11, 2014, Plaintiff filed its instant motion for summary disposition pursuant to MCR 2.116(C)(10). On February 4, 2015, Defendant filed its response to the instant motion and its request for leave to file a counter-complaint. On February 5, 2015, Plaintiff filed a reply in support of its motion. On February 9, 2015, the Court held a hearing in connection with the motion and took the matter under advisement.

Standard of Review

A motion under MCR 2.116(C)(10) tests the factual support of a claim. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). In reviewing such a motion, a trial court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties in the light most favorable to the party opposing the motion. *Id.* Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law. *Id.* The Court must only consider the substantively admissible evidence actually proffered in opposition to the motion, and may not rely on the mere possibility that the claim might be supported by evidence produced at trial. *Id.*, at 121.

Arguments and Analysis

While Defendant does not dispute that its has failed to make the payments required by the Note, its opposition to Plaintiff's motion is based on its contention that the original purchase price set forth in the closing documents was determined as the result of a mutual mistake, or in the alternative that the price was agreed to based on its own unilateral mistake and Plaintiff's

fraudulent/inequitable conduct. As a result, Defendant asserts that Plaintiff's motion should be denied and that it should be allowed to file a counter-complaint seeking to reform the Agreement and Note.

Michigan courts possess the equitable power to reform a contract that does not express the true intent of the parties as a result of fraud, mistake, accident, or surprise. *Johnson Family Ltd. Partnership v White Pine Wireless, LLC,* 281 Mich App 364, 371–372; 761 NW2d 353 (2008). To reform a written instrument on the ground of mistake, the mistake must be mutual and common to both parties to the contract. *Emery v Clark,* 303 Mich 461, 472–473; 6 NW2d 746 (1942), quoting *Lahey v Hackley Union National Bank,* 270 Mich 438; 259 NW 130 (1935). Reformation will generally not be granted, however, for a mistake of law (i.e., a mistake regarding the legal effect of the agreement). *Olsen v Porter,* 213 Mich App 25, 28–29; 539 NW2d 523 (1995). Nor is a unilateral mistake sufficient to warrant reformation. *Casey v Auto Owners Ins. Co.,* 273 Mich App 388, 398; 729 NW2d 277 (2006). Instead, courts will reform an instrument to reflect the parties' actual intent where there is clear evidence that both parties reached an agreement, but as the result of mutual mistake, or mistake on one side and fraud on the other, the instrument does not express the true intent of the parties. *Ross v Damm,* 271 Mich 474, 480–481; 260 NW 750 (1935). Reformation is appropriate if "the evidence of the mistake and mutuality thereof" is "so clear as to establish the fact beyond cavil." *Lyons v Chafey,* 219 Mich. 493; 189 NW 86 (1922). The burden of proof is upon the party seeking reformation. *Emery,* 303 Mich at 472–73.

The original purchase price was to be calculated pursuant to the methodology set forth in Section 2.1 of the Agreement. Section 2.1 provides:

> 2.1(a) Purchase Price. [Defendant] and Sellers (Plaintiff's predecessor's in interest) covenant and agree that the purchase price shall be an amount equal to

> the annual gross agency revenue of the following entities, known as Business Insurers of America, Inc., a Michigan Corporation, corporate ID# 532521, Associated Truckers Council, Inc., a Michigan Corporation, corporate ID# 143386, and International Border Services, Inc., a Michigan Corporation, corporate ID# 396085, for the time period through the date of closing, January 1, 2007 through December 31, 2007, multiplied by a factor of 1.65.

Accordingly, the sales price was to be determined by first determining the 2007 net sales amount for each of three companies Defendant was purchasing. It is undisputed that Plaintiff computed the sales amount based on the calculations set forth in a February 7, 2008 letter sent by Willis G. Clark, CPA to the parties' principals. (*See* Defendant's Exhibit 1.) While Defendant now contends that the calculation was wrong, Defendant's objection is untimely.

Defendant's position is that Plaintiff's agent failed to calculate the purchase price correctly. Such allegations sound in either contract or fraud. With respect to contract, Defendant's position amounts to an assertion that Plaintiff's actions amount to a breach of section 2.1 of the Agreement by failing to calculate the purchase price as provided by the Agreement. However, to the extent that Defendant alleges that Plaintiff breached the Agreement, its allegations are barred by the statute of limitations. The statute of limitations for a breach of contract claim is six years. MCL 600.5807(8). The Agreement was allegedly breached in December 2007 when the Note containing the allegedly improper purchase price was executed. Despite owning the business for almost 7 years, Defendant did not raise the calculation issue until after Plaintiff filed its complaint in this matter in November 2014. Consequently, Plaintiff's current position is untimely as it was first advanced over 6 years after the alleged breach.

In addition, Defendant's claim is barred to the extent it is based on fraud. The statute of limitations for fraud claims is six years, MCL 600.5813; *Kuebler v Equitable Life Assurance Society of the United States,* 219 Mich App 1, 6; 555 NW2d 496 (1996). As was the case with

Defendant's potential breach of contract claim, Defendant's position is time-barred to the extent it is based on Plaintiff's allegedly fraudulent conduct.

Additionally, the Court is convinced that even were Defendant's fraud claim not time-barred, it fails in light of the fact that Defendant had access to the information it would have needed in order to assure that the proper sales price had been calculated. It appears undisputed that Defendant had full access to the financials of the businesses to be sold prior to the time the Note was signed. However, rather than having its own accountant or other agent calculate the payment amount, it chose to agree to Plaintiff's accountant's calculation rather than incur the cost of having an independent calculation produced. There can be no fraud where a person has the means to determine that a representation is not true. *Cummins v Robinson Twp*, 283 Mich App 677, 696; 770 NW2d 421 (2009). In this case, Defendant had the means to determine that the purchase price was incorrect but failed to avail itself of that opportunity. Accordingly, the Court is convinced that Defendant's request for reformation based on Plaintiff's allegedly fraudulent conduct must be denied.

Conclusion

Based upon the reasons set forth above, Plaintiff's motion for summary disposition is GRANTED. Further, Defendant's request for leave to file an amended counterclaim is DENIED. This *Opinion and Order* resolves the last claim but does not close the case as the issue of damages remains OPEN. See MCR 2.602(A)(3). Plaintiff shall submit a proposed judgment to the Court within 28 days of the date of this Opinion and Order. Defendant shall file any objections to the proposed judgment within 14 days of Plaintiff submitting its proposed judgment.

IT IS SO ORDERED.

/s/ John C. Foster
JOHN C. FOSTER, Circuit Judge

Dated: February 25, 2015

JCF/sr

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